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Attorneys for Plaintiffs
LENSCRAFTERS, INC. and EYEXAM OF
CALIFORNIA, INC.

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LENSCRAFTERS, INC. and EYEXAM OF
CALIFORNIA, INC.,

Plaintiffs,

v.

LIBERTY MUTUAL FIRE INSURANCE
COMPANY; EXECUTIVE RISK SPECIALTY
INSURANCE COMPANY; UNITED STATES
FIRE INSURANCE COMPANY; MARKEL
AMERICAN INSURANCE COMPANY and
WESTCHESTER FIRE INSURANCE COMPANY,

Defendants,

AND RELATED COUNTER- AND CROSS-
CLAIMS.

Case No.: C-07-2853 SBA

**DECLARATION OF CELIA M.
JACKSON IN SUPPORT OF MOTION
FOR LEAVE TO FILE FIRST
AMENDED COMPLAINT**

Date: October 2, 2007

Time: 1:00 p.m.

Courtroom: 3

The Hon. Sandra Brown Armstrong

1 I, Celia M. Jackson, declare:

2 1. I am an attorney in the law firm of Heller Ehrman LLP, counsel of record for
3 Plaintiffs LensCrafters, Inc. and EYEXAM of California, Inc. (together, "LensCrafters") in this
4 action. I have personal knowledge of the matters stated in this declaration, and if I were asked to
5 testify regarding these matters, I could competently do so.

6 2. This Declaration is filed in support of LensCrafters' Motion for Leave To File
7 Amended Complaint. LensCrafters' proposed amended complaint is attached to its Motion as
8 Exhibit 1. I have provided counsel for defendant insurers with a copy of the proposed amended
9 complaint prior to filing this motion. LensCrafters' proposed amendment adds a claim for breach
10 of contract against all defendant insurers, based on their breach of the duty to indemnify and to
11 settle the *Snow* Action. The proposed amendment also adds a claim for tortious breach of the
12 covenant of good faith and fair dealing against three insurers: United States Fire Insurance
13 Company ("U.S. Fire"), Markel American Insurance Company and Westchester Fire Insurance
14 Company. In addition to these new claims, the proposed amended complaint includes new
15 allegations describing the facts that have occurred since July 26, and makes other changes
16 (particularly in the introductory section) to reflect the recent factual developments and the new
17 claims. No new parties have been added, however, and the insurance policies cited are the same as
18 those included in LensCrafters' original complaint.

19 3. Attached to this Declaration as Exhibit 1 is a true and correct copy of the Second
20 Amended Class Action Complaint in the case *Melvin Gene Snow, et al. v. LensCrafters, Inc., et al.*,
21 San Francisco Superior Court Case No. CGC-02-40554 (the "*Snow* Action").

22 4. The allegations in the *Snow* Action arise out of a "co-location" model used by
23 LensCrafters, Inc. and EYEXAM of California, Inc. ("EYEXAM") in more than 90 LensCrafters
24 stores in California. As alleged in the *Snow* complaint, plaintiffs seek to have the court certify a
25 class of persons who had their eyes examined at EYEXAM and purchased eyewear from
26 LensCrafters on the same day. LensCrafters estimates that there are more than 1 million potential
27 class members.

28 5. In March 2004, LensCrafters filed an action for declaratory relief and breach of

1 contract against one Insurer, Liberty Mutual Fire Insurance Company (“Liberty”); LensCrafters
2 later amended that complaint to add another Insurer, Executive Risk Specialty Insurance Company
3 (“ERSIC”). That action was assigned to this Court under Case No. C04-01001 SBA (the “Prior
4 California Action”) and adjudicated claims related to the duty to defend. This Court found that
5 Liberty and ERSIC both have a duty to defend LensCrafters for the claims asserted in the *Snow*
6 Action. Judgments were entered in that action in November 2005 and are currently on appeal to the
7 Ninth Circuit.

8 6. In the Prior California Action, LensCrafters had also alleged claims related to the
9 duty to indemnify. On June 21, 2005, the parties stipulated and the Court ordered that the
10 indemnity claims in the Prior California Action would be dismissed because they were not ripe for
11 adjudication at that time. The stipulated order provided that any party could re-file the dismissed
12 indemnity claims, but such action had to be filed in the Federal District Court for the Northern
13 District of California. A true and correct copy of the Court’s Order is attached to this Declaration
14 as Exhibit 2.

15 7. Earlier this year, the parties in *Snow* began serious settlement discussions. As
16 coverage counsel for LensCrafters, I was aware of those discussions and participated in three
17 mediation sessions related to settlement of the *Snow* case. On April 27, 2007, the parties in *Snow*
18 — along with Liberty, U.S. Fire, and the other Insurers — attended a mediation at which significant
19 progress was made towards settlement. Negotiations continued following this mediation session,
20 and LensCrafters kept Insurers apprised of developments. By May it had become apparent that
21 Insurers’ positions on certain insurance issues — such as whether the *Snow* claims are covered,
22 whether Insurers had a duty to fund a settlement, and how settlement funding should be allocated
23 among Insurers — represented a major obstacle to settlement. To resolve these issues, on May 31,
24 2007, LensCrafters filed this action for declaratory relief.

25 8. On May 24, 2007, U.S. Fire filed a declaratory relief action against LensCrafters and
26 the other insurers (except ERSIC) in the State of New York. In a “pre-motion letter” filed in
27 accordance with New York procedure, LensCrafters has asked the New York Court to dismiss or
28 stay the New York action. On August 3, 2007, the Court set a briefing schedule with a hearing date

1 of October 29, 2007.

2 9. In June LensCrafters reached a settlement with the *Snow* plaintiffs, contingent on
3 approval and funding by Insurers. LensCrafters asked Insurers to accept the settlement, which was
4 reasonable in terms of LensCrafters' exposure in the *Snow* Action and was within the limits of the
5 Insurers' policies. A further mediation session was scheduled for July 26, 2007 to finalize the
6 settlement, and Superior Court Judge Richard Kramer, who is handling the *Snow* Action, issued an
7 order requiring the parties and Insurers to attend. Nevertheless, U.S. Fire refused to attend. This
8 mediation, however, was unsuccessful. The insurers refused to accept and fund the *Snow*
9 settlement, thereby breaching their insurance contracts.

10 10. Before filing this motion, I contacted by telephone counsel for each of the insurers to
11 obtain consent for filing LensCrafters' proposed amended complaint and to see if LensCrafters
12 could file the complaint pursuant to stipulation. U.S. Fire, however, told LensCrafters that it would
13 not stipulate to the proposed amended complaint. Attached to this Declaration as Exhibit 3 is an
14 email message I received from U.S. Fire's counsel, Amy Rose, that sets forth U.S. Fire's position
15 with respect to LensCrafters' proposed amended complaint.

16 11. Attached to this Declaration as Exhibit 4 is a true and correct copy of a briefing filed
17 by LensCrafters in the New York action filed by U.S. Fire entitled Statement in Reply to
18 Opposition of Assignment to Commercial Division.

19 I declare under penalty of perjury that the foregoing is true and correct.

20 Executed this 6th day of August 2007 in San Francisco, California.

21
22 /s/ Celia M. Jackson

23 Celia M. Jackson
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